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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY- CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service (Fourth Further Notice of Proposed Rulemaking)	)	RM-8221

REPLY COMMENTS OF VIACOM INC.

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SUMMARY

The Commission has both the legal authority and sound policy justifications it needs to adhere to a Title II-based video dialtone ("VDT") framework in regulating the broadened role of local exchange carriers ("LECs") in the provision of video programming. VDT, with its common carriage components, promotes competition among video providers, increases the diversity of programming available to consumers, and encourages investment in advanced telecommunications infrastructure. As the FCC has repeatedly concluded, the VDT framework well serves all these policy goals.

The appellate court decisions striking down the Section 533(b) cross-ownership ban do not circumscribe the Commission's preexisting statutory and constitutional authority to apply common carrier rules to LEC provision of video programming in-region. Section 533(b) did not enable the FCC to develop a regulatory framework for common carrier-based entry into video -- to the contrary, the statutory ban in Section 533(b) only constrained the boundaries within which the Commission could exercise discretion in devising the VDT framework. Moreover, the Constitution presents no impediment to tailored regulation that serves several vital public interest goals while also allowing LECs ample opportunity to "speak" as video programmers.

The appellate court decisions simply free the Commission to allow LECs to participate as one of many would-be programmer-

customers taking VDT platform service under tariff. While this development thus provides no cause for abandonment of the Commission's fundamental common carrier approach with respect to the LEC's role as the VDT platform provider, the LEC's new dual role -- as VDT platform provider and affiliated packager or programmer -- does warrant the addition or refinement of a limited number of Title II-oriented safeguards for the VDT framework.

Specifically, the record strongly supports adoption of the following limited safeguards Viacom believes are necessary to prevent LEC abuse while still maintaining the economic viability and competitive potential of VDT:

- adopt an attribution standard of 10% equity (or de facto control) to encourage investment in VDT;
- ensure that the set-top box (or functionally equivalent network elements) is not used by the LECs as a bottleneck between unaffiliated packagers or programmers and the subscriber in the provision of VDT;
- ensure that all programmers and packagers have the right to nondiscriminatory channel positioning and presentation of program offerings to subscribers;
- apply existing channel capacity limitations to LEC-affiliated packagers and programmers, with provision for minimizing unused capacity;
- ensure that "channel-sharing" does not undermine the primacy of the rights of a programmer to control the licensing of its product or impede packager competition; and
- tailor the joint marketing and CPNI rules to limit the potential for anticompetitive activities by LECs while at the same time promoting the competitiveness of VDT.

Finally, Viacom submits that the Commission must closely scrutinize proposals for various additional safeguards that could overburden and inhibit the competitive potential of LEC entry into video distribution. Specifically, Viacom submits that application of the program access rules to LECs would have the perverse result of limiting the ability of LECs and VDT to compete with cable, contrary to the express goals of those rules.

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Viacom Inc. ("Viacom") hereby submits its reply to comments submitted in connection with the Commission's Fourth Further Notice of Proposed Rulemaking ("Fourth Further Notice") in the above-captioned "video dialtone" ("VDT") proceeding.[1] The voluminous record now before the Commission is replete with contradictory opinions as to how to regulate the direct provision of video programming by local exchange carriers ("LECs") within their telephone service areas. The Commission will not be surprised to find that the legal conclusions drawn by commenters coincide with their private preferences as to the terms of LEC entry. The task before the Commission, of course, is to

[1] Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 95-20 (released Jan. 20, 1995) (synopsis at 60 Fed. Reg. 8996 (1995)).

determine which regulatory course best serves the public interest.

Viacom respectfully submits that these predictable positions present no compelling reason -- as a matter of law or policy -- for the Commission to deviate from the course it has already determined serves the public interest well: a Title II-based VDT framework to govern the LECs' dual role as platform provider and video packager or programmer.[2] As shown infra in the Section I policy discussion, continued application of common carrier regulation to the video platform component of the LECs' new dual role will serve all of the FCC's competition, infrastructure, and diversity goals. Section II demonstrates that, as a legal matter, the Commission retains the authority and discretion to employ the VDT framework in establishing the terms for the LECs' direct provision of video programming in-region. Section III outlines the need for certain limited additions and refinements to VDT safeguards so that LEC entry as (or a significant LEC interest in) a VDT packager or programmer will not allow the LEC -- in its role as the platform provider -- to unfairly discriminate against unaffiliated programmers and packagers. Finally, Section IV notes that circumstances do not warrant the imposition of unnecessary restrictions, such as the Cable Act's

[2] Telephone Company - Cable Television Cross-Ownership Rules, 7 FCC Rcd. 300 (1991) (hereinafter "First Report and Order").

program access rules,[3] that could impede VDT's competitive development.

I. THE RECORD CONFIRMS THAT THE FCC'S VDT FRAMEWORK FURTHERS THE COMMISSION'S POLICY GOALS FOR INTERMODAL AND INTRAMODAL COMPETITION AND FOR DEVELOPMENT OF AN ADVANCED TELECOMMUNICATIONS INFRASTRUCTURE

Viacom respectfully submits that the Commission look no further than to its own long-standing policy goals in formulating the regulatory framework for a broadened LEC role in video distribution. As a programmer whose overriding goal in this proceeding is to ensure the availability of competing outlets over which to offer its programming to consumers, Viacom has consistently and strongly supported the FCC's vision for a common carrier video platform under the VDT framework. Viacom's own interests are fully in accord with those of the Commission and other policymakers who seek real, sustainable competition in the distribution of multichannel video programming.

Nothing in the record casts doubt on the Commission's determination that the VDT common carrier regulatory scheme can serve all the agency's original policy goals for a broadened LEC role in the delivery of video programming. These goals include (1) increased investment opportunities for the development of an

[3] 47 U.S.C. § 548; 47 C.F.R. § 76.1000 et seq.

advanced telecommunications infrastructure,[4] (2) fostering additional competition in the provision of video and communications services,[5] and (3) encouraging a diversity of programming in order to maximize consumer choice.[6] The FCC has repeatedly affirmed -- without regard to the applicability of the Section 533(b) cross-ownership ban -- that "maintaining common carrier obligations on the basic video dialtone platform is fundamental to achieving" these public interest objectives.[7]

Viacom and others recognize that among VDT's most compelling features is its unique facility for fostering competition both among rival transmission systems (i.e., "intermodal" competition) and among rival packagers and programmers using the same VDT platform (i.e., "intramodal" competition).[8] Employing the VDT

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4 See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, 3 FCC Rcd. 5849, 5866 (1988) (hereinafter "Further Notice of Inquiry"); First Report and Order, 7 FCC Rcd. at 304; Telephone Company - Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5787 (1992) (hereinafter "Second Report and Order").

5 Id.

6 Id.

7 Telephone Company-Cable Television Cross Ownership Rules, 10 FCC Rcd. 244, 259 (1994) (hereinafter "Memorandum Opinion & Order on Recon.). See, e.g., First Report & Order, 7 FCC Rcd. at 304; Second Report & Order, 7 FCC Rcd. at 5850. At that time, the Commission recommended applying its VDT framework to LEC entry as a direct program provider, as well, along with certain additional safeguards. Id. at 5847-48.

8 Support for Title II regulation is echoed by the coalition of consumer groups (led by The Center for Media Education) filing in this proceeding: "If LECs were regulated under Title VI, they would act as gatekeepers" and might "have

framework for LEC entry would promote sustainable competition among rival video packagers or outlets, no matter how the marketplace for wireline facilities competition may develop.

It is curious how many commenters, when opining on how the Commission should regulate the direct provision of programming by LECs, fail to address the FCC's three principal goals for LEC distribution of video programming.[9] Instead, the majority of commenters focused on only one of the FCC's goals -- increased competition -- and, even then, on only one aspect of that one goal: how a LEC as a direct provider of video programming should be positioned as an intermodal competitor to traditional cable systems.[10] By virtually ignoring the crucial aspect of

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sufficient market power and resources to simply replace cable operators as video service monopolists, instead of adding a competing service for consumers." Comments of The Center for Media Education, et al., CC Docket No. 87-266, at 6-7 (filed Mar. 21, 1995) (hereinafter "CME Comments"); <u>see also</u> Comments of Entertainment Made Convenient U.S.A., Inc., CC Docket No. 87-266, at 9 (filed Mar. 21, 1995) (hereinafter "EMC3 Comments").

[9] To the extent that some LECs assert (without a factual showing) that common carrier obligations would be too costly -- and thus "bad policy" -- Viacom shares their desire to avoid unnecessary VDT regulatory burdens. <u>See</u>, <u>e.g.</u>, Initial Comments of Southwestern Bell Corporation, CC Docket No. 87-266, at 18 (filed Mar. 21, 1995) (hereinafter "Southwestern Bell Comments"). Viacom does not, however, share some commenters' interests in a framework that would fail to sufficiently safeguard the provision of an open, nondiscriminatory platform for enhanced video competition.

[10] <u>See</u>, <u>e.g.</u>, Comments of US WEST Communications, Inc., at 9 (hereinafter "US WEST Comments"); Comments of Continental Cablevision, Inc., et al., at 3-4 (hereinafter "Continental Comments"); Comments of the National Association of Telecommunications Officers and Advisors, et al., at 12-14 (hereinafter "NATOA Comments"); Comments of the Alliance for

intramodal competition, however, many cable operators, local governments, and LECs did not address the extent to which the VDT framework's common carrier platform assures access for programmers unaffiliated with a LEC -- and thus effectively promotes both competition among rival packagers using the same system and a diversity of voices reaching subscribers.[11] As for the Commission's infrastructure goal, commenters offered little to cast doubt on the potential for Title II regulation of LEC entry to foster the development of advanced, integrated networks capable of providing sophisticated, interactive telecommunications services of every sort.

While Viacom believes there is a need for certain specifically tailored safeguards governing LECs in their capacity as direct providers of programming, Viacom nonetheless agrees with those commenters who warn against encumbering VDT with unnecessary restrictions for reasons of artificial parity or

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Community Media, et al., at 6-8 (hereinafter "PEG Access Coalition") [all filed in CC Docket No. 87-266 on Mar. 21, 1995].

[11] To the extent that some parties suggest that certain Cable Act provisions would afford programmers the ability to gain carriage, see, e.g., Comments of the Joint Parties (Adelphia Communications Corporation, et al.), CC Docket No. 87-266, at 5-7 (filed Mar. 21, 1995) (hereinafter "Joint Parties Comments"), the limited access rights provided under those provisions do not even purport to replicate the Commission's vision for access rights provided under Title II-based VDT regulation.

otherwise.[12] Reasonable terms of entry are particularly needed if VDT is to emerge as an effective source of intermodal competition to cable systems. Viacom thus does not propose adding Title VI-based restrictions wholesale to the VDT common carrier framework. VDT must remain an attractive economic proposition for LECs if the Commission is to achieve its goals for multichannel video competition and rapid deployment of an advanced telecommunications infrastructure.[13] The VDT framework should simply be augmented with a limited number of Title II-

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[12] See infra note 12. Contra, e.g., Comments of the Cable Telecommunications Association at 5 (hereinafter "CATA Comments") (urging "regulatory parity"); cf. Comments of BellSouth Corporation at 25-26 (hereinafter "BellSouth Comments") [both filed in CC Docket No. 87-266 on Mar. 21, 1995]. Identical regulatory treatment is not necessary to foster vigorous competition among rivals employing different systems to reach consumers. Regulatory parity serves no function when such identical rules would make no sense in dissimilar settings and serve fewer -- or even thwart -- public interest goals. Accord CME Comments at 5.

Some parties recommend that the FCC should jettison the VDT framework because LECs have made clear "through their current VDT applications" that they are interested only in mimicking cable systems. See, e.g., Comments of Cox Enterprises, Inc., CC Docket No. 87-266, at 7-13 (filed Mar. 21, 1995) (hereinafter "Cox Comments"); cf. Southwestern Bell Comments at 2. That some VDT applications may attempt to replicate a traditional cable system in some respects is not grounds for abandoning the Title II scheme. To the contrary, these objections simply highlight the need for the Commission to refine its VDT framework with regard to its channel capacity, nondiscrimination, and related safeguards. See infra Section III.

[13] See, e.g., U S WEST Comments at 31 ("surest way to make a VDT service more attractive and stimulate deployment of VDT service is to allow LECs to provide video programming within the existing regulatory structure without an array of new regulatory requirements.")

based safeguards tailored specifically to address the Commission's policy goals and respond to the increased incentives and opportunity for improper discrimination potentially possessed by a LEC that competes as a VDT packager or programmer on its own VDT platform.[14]

In addition to the policy justifications supporting application of a refined VDT framework to govern the LEC's expanded role in providing video programming, the FCC also has the legal authority to implement a Title II-based approach, as demonstrated in the next section.

II. THE CONFLICTING LEGAL INTERPRETATIONS OF RIVAL INTERESTS NOTWITHSTANDING, THE FCC'S AUTHORITY TO REGULATE LEC PROVISION OF VIDEO PLATFORM SERVICE ON A COMMON CARRIER BASIS FULLY SURVIVES THE FALL OF THE CABLE/TELCO CROSS-OWNERSHIP BAN

Many commenters claim that the law denies the Commission the discretion to regulate LEC video program provision in any manner other than the one favored by that particular commenter.[15] In

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[14] Accord AT&T Comments, CC Docket No. 87-266 at 9 (filed Mar. 21, 1995) (without protection, unaffiliated programmers could be foreclosed from access to, and fair competition upon, VDT platforms). Viacom thus disagrees with LECs that contend that the VDT framework requires no further refinement once LECs or their affiliates become rivals to independent programmers and packagers using the platform. See, e.g., Comments of the United States Telephone Association on Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266 at 21 (filed Mar. 21, 1995) (hereinafter "USTA Comments").

[15] Compare, e.g., Comments of Ameritech Corporation, CC Docket No. 87-266, at 7-9 (filed Mar. 21, 1995) (hereinafter "Ameritech Comments"), (LECs offering their own video programming must be free to choose to offer either Title II or Title VI

isolation, these analyses fail to provide a complete picture of the FCC's regulatory authority. Taken together, these analyses are irreconcilable. While many commenters "agree" that the law provides a clear-cut answer to the jurisdictional questions raised by LEC entry as an in-region program provider, those commenters disagree on which clear-cut answer is correct.[16]

This lack of consensus alone suggests that the Commission has more discretion than described by any of these commenters. Indeed, as demonstrated below, neither the Communications Act nor the Constitution compels the Commission to submit to one particular outcome favored by one commenter or another. The Commission retains the discretion, in particular, to decide that the public interest justifies -- and no law precludes -- continued FCC reliance on the VDT framework for regulating LEC entry into the direct provision of video programming.

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service) with Comments of California Cable Television Association, CC Docket No. 87-266 at 10-15 (filed Mar. 21, 1995) (hereinafter "CCTA Comments") (LEC offering its own video programming must be regulated under Title VI).

[16] In large measure, the differing conclusions appear premised on the commenters' perception of which regulatory regime places "far greater regulatory burdens" on an entity -- Title II or Title VI. U S WEST Comments at 16; see also, e.g., Comments of Bell Atlantic, CC Docket No. 87-266 at 6-7 (filed Mar. 21, 1995) (hereinafter "Bell Atlantic Comments"); Joint Parties Comments at iv-v.

A. FCC Authority Under the Constitution

The appellate court decisions at issue here invalidated Section 533(b) only because it stood as an absolute bar to LECs "speaking" as video programmers through any wireline system to their in-region telephone customers.[17] Judicial elimination of the ban does not, however, call into question the Commission's authority to regulate the terms under which LECs may proceed to serve as video programming providers in-region. Nor does the invalidation of Section 533(b) automatically establish the appropriate regulatory regime for LEC entry, a point with which the appellate decisions concur.[18]

Viacom does not dispute that the appellate court decisions require that LECs be permitted a broadened role in the provision of video programming to subscribers within their telephone service regions. But LECs read the court decisions too broadly when they contend that the Constitution gives LECs unfettered power to decide how they might be regulated or that "any attempt by the Commission to forcibly impose common carrier obligations

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[17] C&P Telephone v. U.S., 42 F.3d 181, 198 (4th Cir. 1994); U S WEST Inc. v. United States, 1994 U.S. App. Lexis 39135. (Dec. 30, 1994).

[18] C&P Telephone, 42 F.3d at 201-203; U S WEST, 1994 U.S. App. LEXIS at 39159-64 (both invalidating statute because it completely banned video speech).

for video speech would . . . constitute an independent constitutional violation."[19]

As Viacom previously explained, recent Supreme Court analysis makes clear that a Commission decision to employ a Title II common carrier framework for regulating LEC direct provision of video programming would likely be subject to an intermediate level of review under the First Amendment.[20] Under this standard, the Constitution would simply require that regulation of LECs' video programming "speech" (1) serve a significant government interest, (2) be narrowly tailored to address that interest, and (3) leave open ample alternative channels for communication.[21]

As to the first prong of the intermediate scrutiny standard, several significant government interests would be served by requiring a LEC to provide nondiscriminatory VDT platform service to all would-be programmers and packagers, including its own programming affiliate. Section I, supra, demonstrated that the VDT framework will help further a diversity of voices, provide

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[19] Comments of Bell Atlantic on the Fourth Further Notice, CC Docket No. 87-266 at iii (filed Mar. 21, 1995).

[20] Accord CME Comments at 22-25. Even most LECs do not seriously contend that the VDT framework would be subject to "strict scrutiny," the highest level of First Amendment review. See Comments of Viacom, Inc., CC Docket No. 87-266 at 9 n. 15 (filed Mar. 21, 1995) (hereinafter "Viacom Comments"); accord e.g., BellSouth Comments at 2.

[21] See, e.g., Turner Broadcasting Systems, Inc. v. United States, 114 S. Ct. 2445 (1994); see also C&P Telephone, 42 F.3d at 198-99; U S WEST, 1994 U.S. App. Lexis at 39135.

incentives for investment in advanced telecommunications infrastructure, and foster fair, widespread competition among video programmers.[22]

Employing the VDT framework for LEC entry also would satisfy the remaining prongs of the intermediate scrutiny test. It would meet the narrow tailoring requirement because -- with certain additional adjustments -- the VDT framework can appropriately address the potential for anticompetitive conduct by a LEC as platform provider without impeding the LEC's right of speech.[23] Indeed, the two appellate decisions and all reported district court decisions concerning constitutional challenges to Section 533(b) pointed to the Commission's VDT framework as an example of regulation that would address the government's interests while also appropriately accommodating LECs' constitutional rights.[24]

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[22] See Viacom Comments at 8 n.14 (noting Fourth Circuit holding in C&P Telephone that the government's interests meet or exceed the "significance" standard of intermediate scrutiny because, among other goals, "eliminating fair restraints on competition is always substantial, even where the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment").

[23] When tailored as Viacom and others have suggested, see infra notes 25, 35, 63 and accompanying text, the VDT framework will not "burden substantially more speech than is necessary to further the government's legitimate interests." Turner, 114 S. Ct. at 2470 (citations omitted). Furthermore, nothing in the VDT framework ultimately "limits the amount of speech a telephone company can provide over its own network," Bell Atlantic Comments at 13, except for the LECs' own business decisions regarding provision of additional network capacity.

[24] See Viacom Comments at 8-9 & nn. 12, 15.; see also Chesapeake & Potomac Tel. Co. of Virginia v. United States, 830 F. Supp. 909, 930-31 (E.D. Va. 1993); BellSouth Corp v. United

Finally, the VDT regulatory framework by definition satisfies the final prong of the intermediate scrutiny test -- leaving open ample alternative channels of communication -- because the VDT framework leaves the LEC's own platform open to serve as a channel for LEC provision of video programming.[25]

Commenters that oppose the application of common carrier regulation to LEC provision of video programming also raise Equal Protection arguments that the courts have made clear are generally redundant -- and unavailing -- in the context of "speaker-specific" challenges to speech restrictions.[26] Because

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States, 868 F. Supp. 1335, 1342 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 735 n.9 (N.D. Ill. 1994).

[25] In the words of the Fourth Circuit, LEC provision of programming via a VDT platform would provide "ample channels of communication" because it is "sufficiently similar to the method [of providing video programming] foreclosed by the regulation." C&P Telephone, 42 F.3d at 203.

The Commission could determine that other additional in-region "channels" for LEC video speech would be appropriate. For example, several small LECs, in particular, have argued that the anticipated expense of upgrading facilities to accommodate VDT platform functions would effectively prevent them from carrying any video programming services if the FCC required them to do so on a common carrier basis. See, e.g., Comments of The Lincoln County Telephone System Inc., CC Docket No. 87-266 at 2 (filed March 21, 1995). Comments of The Organization for the Protection and Advancement of Small Telephone Companies, CC Docket No. 87-266 at 12 (filed Mar. 21, 1995) (hereinafter "OPASTC Comments"). Viacom would not oppose a narrow exemption to the general common carrier framework if it were targeted to the small LECs that now qualify for the so-called rural exemption (i.e., communities with a population below 2,500).

[26] See, e.g., U S WEST Comments at 3 n.6 (citing Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1987) and Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)); Bell Atlantic Comments at 20-21 (citing,

the application of common carrier obligations to LEC provision of video programming would be "based only on the manner in which [LECs] transmit their messages, and not upon the messages they carry," the requirement can be "justified entirely by the peculiar economic and physical characteristics" of the LECs' chosen transmission medium.[27]

B. FCC Authority Under the Communications Act

Many commenters seem to allow the change wrought by the appellate court decisions to distract them from the issue of the Commission's authority to regulate common carriers and establish new LEC offerings to which Title II obligations appropriately attach. One would not expect that elimination of a statutory ban would restrict -- rather than expand -- the scope of the Commission's pre-existing authority. Yet many commenters so argue.

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among others, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)); Joint Parties Comments at 17-18 (citing same). With respect to separate constitutional grounds for challenging speech restrictions, these cases have been implicitly overruled by R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538 (1992) (noting that while the Court has "occasionally fused the First Amendment into the Equal Protection Clause," the analysis is duplicative because "the only reason [the] government interest is not a 'legitimate' one is that it violates the First Amendment"); accord Turner, ___ U.S. at ___, 114 S. Ct. at 2467 (precedent "does not support appellants' broad assertion that all speaker-partial laws are presumed invalid").

[27] The courts are unlikely to invalidate as a "taking" the common carriage tenet of utility regulation, especially as narrowly tailored to provide for maximum usage of available channels by the LEC itself. See infra note 63.

Cable operators contend that the Commission has no choice but to apply full Title VI obligations on LECs providing in-region video programming, with Title II perhaps layered on as well.[28] Other commenters also call for the application of Title VI and its provision for franchise fees and for mandatory access for local broadcasters and access channel programmers.[29] Meanwhile, LECs contend that they must be free to choose between offering a Title II service or a Title VI service and that the Commission cannot, in any case, burden them simultaneously with obligations derived from each title.[30] In short, while they disagree on the constraints, all these commenters argue that the Commission's discretionary authority is highly circumscribed.

The FCC's powers are not, however, so narrow as these commenters contend. The Commission's authority to require that LEC provision of a video platform be regulated on a common carrier basis is no less valid or compelling now than it was when

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[28] See, e.g., Comments of Home Box Office in the Fourth Notice of Proposed Rulemaking, CC Docket 87-266 at 2-3 (filed Mar. 21, 1995) (hereinafter "HBO Comments").

[29] See, e.g., PEG Access Coalition Comments at 6-29; Comments of the United States Conference of Mayors, et al., at 5-28; Comments of National Broadcasting Co., Inc., at 2-6 [both filed in CC Docket No. 87-266 on Mar. 21, 1995].

[30] See, e.g., Comments of GTE Service Corporation, CC Docket No. 87-266 at 24-26 (filed Mar. 21, 1995) (hereinafter GTE Comments).

the VDT policy was first initiated.[31] Section 533(b) did not provide the statutory authority enabling the FCC to adopt its VDT framework; therefore invalidation of Section 533(b) does nothing to alter the Commission's authority to maintain that framework. To the contrary, the statutory ban only served to limit the FCC's authority to allow LECs to provide "video programming" in-region under any regulatory scheme. Thus, the fall of Section 533(b) mandates only that LECs be free to become programmers taking video platform service under tariff.

The Commission's underlying authority to determine that Title II requirements should attach to the LEC platform for video programming derives from its general Title I mandate to "regulate communication by wire" and its judicially recognized power to determine that common carrier obligations should attach to newly authorized LEC offerings.[32] The FCC has the "discretion to require" that LECs that directly provide video programming do so

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[31] See Further Notice of Inquiry, 3 FCC Rcd. 5849 (1988), First Report and Order, 7 FCC Rcd. 300, Second Report and Order, 7 FCC Rcd. 5781.

[32] 47 U.S.C. § 151 (broad authority so as to ensure provision of "rapid, efficient, [and] [n]ation-wide" service "with adequate facilities at reasonable charges"); see also Further Notice of Inquiry, 3 FCC Rcd. at 5860 & n.43; First Report and Order, 7 FCC Rcd. at 304. The Act recognizes elsewhere that, under appropriate circumstances, entities can be required to serve the public as common carriers. 47 U.S.C. § 214(d).

under the VDT framework.[33] As outlined supra in Section I, the Commission's multiple policy goals (including fostering greater video competition and incentives for deployment of advanced infrastructure) provide the agency with well-reasoned justifications for concluding that the VDT framework is an appropriate regulatory scheme for governing LEC entry into video distribution.[34] In establishing its VDT policy to date, the Commission has already recognized and affirmed this without doubt as its statutory authority to do so. This remains no less true in the absence of Section 533(b), at least where a LEC offers its video service over plant used in common with, or interconnected

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[33] Nat'l Ass'n of Regulatory Utility Comm'rs v. F.C.C., 525 F.2d 630, 644 n.76 (D.C. Cir. 1976) (hereinafter "NARUC I") (FCC may reasonably require that entities "serve all potential customers indifferently, thus making them common carriers within the meaning of the statute"). See also Nat'l Ass'n of Regulatory Utility Comm'rs v. F.C.C.; 533 F.2d 601 (D.C. Cir. 1976) (hereinafter "NARUC II"); AT&T V. FCC, 572 F.2d 17 (2d Cir. 1978), cert. denied sub nom. IBM Corp. v. FCC, 439 U.S. 875 (1978); cf. Graphnet Systems, Inc., 73 FCC 2d 283 (1979).

[34] Among other goals, Title II regulation will serve the Administration's goal of ensuring that the nation's interconnected telecommunications networks provide "open access" for all forms of electronic communications. See Nat'l Telecommunications and Information Administration, The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49025 (Sept. 15, 1993) (listing open network access, competition, and universal service among goals for the so-called "NII"); CME Comments at 7 (noting LEC reliance on NII to justify grant of VDT applications).

to, facilities over which the LEC provides other common carrier telecommunications service.[35]

The NARUC cases establish that common carrier status is, in the communications context, a function of two attributes. First, the carrier "holds himself out to serve indifferently all users," and, second, the carrier's customers "transmit intelligence of their own design and choosing."[36] As to the first attribute, an entity may by its own course of conduct satisfy the "holding out" prerequisite, but a "binding requirement of such indifferent service" by the FCC is "an adequate substitute" for past conduct where -- as here -- there is no history to draw upon.[37] Case law cited by the LECs to refute the Commission's power to belatedly impose common carrier obligations is factually inapposite.[38]

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[35] Indeed, the FCC exercises exclusive federal jurisdiction over construction and operation of local telco facilities because -- as the courts have recognized -- the local plant "is an 'integral component in an indivisible dissemination system which forms an interstate channel of communication.'" Second Report & Order, 7 FCC Rcd. at 5819-20 (citing General Tel. Co. of Calif. v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969)).

This is not to say that a LEC offering of "stand-alone" cable service could not be regulated under Title VI where, for example, the facilities used in no way share or interconnect with plant over which the LEC offers common carrier services.

[36] NARUC II, 533 F.2d at 609.

[37] Id. To the extent there exists any relevant history here, it is that of the FCC's Title II-based VDT policy to date.

[38] See Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994). The so-called Dark Fiber case does not stand for the proposition that the FCC is powerless to determine that a service must be provided pursuant to Title II. The court merely

The Commission thus fully retains the authority to conclude that the LEC in its role as platform provider must comply with Title II obligations, just as the VDT framework has always required the LEC to offer this service as a common carrier.[39] Conversely, there is no basis for imposing Title II regulation on the LEC-affiliated packager or programmer in its capacity as a customer of the tariffed platform.[40]

It is precisely because the LEC-affiliated packager stands -- like all other packagers or programmers -- as a customer of the tariffed video platform that the Commission retains discretion to determine that the LEC's continued role as video platform provider may continue to fall within the purview of Title II and need not be automatically governed by Title VI. LEC entry as one of several programmers carried on a VDT platform

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remanded the case to the Commission for further deliberation after determining that simple filing of individual customer contracts with the FCC (which specified varying terms and conditions) did not meet the "holding out" attribute of a common carrier.

[39] In proposing the VDT framework, the Commission explained that "we would view any safeguards we might impose on telephone companies relating to their provision of video programming services as regulation of those entities as common carriers. These safeguards are necessary to fulfill our Title II obligations to ensure that as common carriers they do not unreasonably discriminate among different customers." Further Notice of Inquiry, 3 FCC Rcd. at 5873 n. 43.

[40] In one of its earliest VDT orders, the Commission explained that "while we retain our ancillary jurisdiction over such services, we are not here proposing to subject video programming activities of telephone companies to Title II regulation," Id. at 5873 n.43, as opposed to LECs' activities as platform providers.